

Chapter 5

Unfair Contract Terms in Consumer Contracts

Nyuk Yin Nahan and Eileen Webb

I The Setting

A The Rise and Dilemma of Standard Form Contracts

Students new to contract law are often amazed at the number of contracts they enter into each day without being conscious of doing so. Similarly, consumers enter into contracts without any opportunity to strike a deal, let alone to co-determine their rights and duties. The ascendancy of online transactions amplifies this situation.¹ Much of the consumers' lot is in fact decided by standard form contracts.

These contracts are presented to consumers as a *fait accompli*.² They expedite commercial efficiency – saving time, offering certainty, minimising misunderstandings and cutting costs: all of which leads to lower prices.³ But they have a dark side.⁴ In most cases, consumers do not have an opportunity

1 See further Chapter 15 of this volume.

2 Australian Competition and Consumer Commission (ACCC), *Guide to the Unfair Contracts Terms Law* (Australian Consumer Law, Canberra, July 2010) <<http://www.accc.gov.au/content/item.phtml?itemId=937060&nodeId=474f2089fe9f431870dd3e420363bc33&fn=A%20guide%20to%20unfair%20contract%20terms%20guide.PDF>> accessed 16 September 2012, p 4: 'in broad terms, a standard form contract will typically be one that has been prepared by one party to the contract and is not subject to negotiation between the parties – that is, it is offered on a "take it or leave it" basis'. Indeed, issues surrounding standard form contracts are not limited to contemporary circumstances. Today's concerns bear a striking similarity to those expressed when standard form contracts were introduced: Llewellyn K, 'Book Review – O Prausnitz, *The Standardisation of Commercial Contracts in English and Continental Law*' (1939) 52 *Harvard Law Review* 700 at 701.

3 Elvin J, 'The Application of the Unfair Contract Terms in Consumer Contracts Regulations 1999' (2003) 14 *Kings College Law Journal* 39 at 41; Willett C, *Fairness in Consumer Contracts: The Case of Unfair Terms* (Ashgate Publishing Ltd, United Kingdom, 2007), p 4; Friedman D, *Law's Order: What Economics Has to Do with Law and Why It Matters* (Princeton University Press, Princeton, 2000), pp 156-157 makes the valid point that business 'cannot negotiate with every single consumer, on every single contract, for every single sale'.

4 See generally Willett, above n 3, para [2.4.2]; Beale H, 'Unfair Contracts in Britain and Europe' (1989) *Current Legal Problems* 192; Wilhelmsson T, 'Cooperation and

This is a preview. Not all pages are shown.